CHAPTER 3

KEY ISSUES

3.1 Although many submissions and witnesses were supportive of any efforts to improve the overall efficiency of migration litigation and, in particular, to reduce genuinely unmeritorious claims, the overwhelming majority of evidence received by the committee expressed strong opposition to key aspects of the Bill.

3.2 This chapter discusses the main issues and concerns raised in the course of the committee's inquiry, including:

- extension of the courts' power to summarily dispose of proceedings;
- the Bill's focus on deterring 'unmeritorious' proceedings, in particular provisions relating to personal liability for legal costs and 'certification' by lawyers acting for applicants in migration cases;
- imposition of time limits for judicial review of migration decisions;
- constitutionality of the term 'purported privative clause decision'; and
- possible alternative approaches to the Bill.

Powers of summary dismissal

3.3 Many submissions and witnesses were critical of provisions in the Bill which expand the power of the courts to dismiss migration cases summarily where there are 'no reasonable prospects of success'. For example, the Queensland Public Interest Law Clearing House (QPILCH) and the South Brisbane Immigration and Community Legal Service (SBICLS) were strongly opposed to such provisions, arguing that the provisions 'represent a significant shift away from the legal principles which have traditionally governed summary dismissal of actions'.[1] Others agreed that the Bill moves away from 'the carefully constructed common law test, which requires that a case be manifestly groundless'[2], or hopeless or bound to fail.[3]

3.4 Professor George Williams and Dr Ben Saul from the Gilbert and Tobin Centre of Public Law explained that the higher common law threshold 'ensures that cases are not disposed of prematurely, before all the evidence has become available during the proceedings on the merits'.[4] Further, they argued that '(r)equiring a

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1 *Submission 11*, p. 7.

2 For example, Professor George Williams and Dr Ben Saul, *Submission 14*, p. 4.

3 For example, Australian Lawyers for Human Rights, *Submission 19*, p. 2.

4 *Submission 14*, p. 4.

reasonable prospect of success risks depriving applicants of a fair opportunity to mount a case'.[5]

3.5 Professor Williams and Dr Saul also pointed out that broadened powers of summary dismissal would have long-term consequences:

> Particularly where public interest test cases are being run to challenge accepted interpretations of the law, there may be 'no reasonable prospect of success' in the immediate case, but the litigation may contribute in important ways to the future evolution of common law principles. Discouraging litigation where there is no reasonable prospect of success risks chilling the progressive development of the law, and stymieing the correction of bad precedents.[6]

3.6 Australian Lawyers for Human Rights (ALHR) submitted that the existing common law test for summary dismissal 'is entirely adequate to identify cases without reasonable prospects of success and allow others to be fully argued'[7] and that '(t)he new legislative test set out in the Bill is unclear and will, in fact, result in further litigation to test its limits'.[8]

3.7 The Refugee Advocacy Service of South Australia noted the possible adverse impact on refugees:

> …migration law can be very complex and therefore the current safeguards on the use of summary judgement are even more pertinent to these cases to avoid the injustice of summarily restricting a person's right to have their day in court. Even more so because of the potential for a forced return of refuges to persecution including torture, imprisonment and death.[9]

3.8 At the hearing, Ms Nitra Kidson from QPILCH told the committee that existing summary dismissal powers have been used to dismiss cases where, for example, applications were not supported by sufficient evidence or applications where the matters have previously unsuccessfully litigated.[10] She argued that the Federal Government's justification for the Bill in this respect is therefore questionable:

> Those are the very types of cases of which the government complains, and the courts have demonstrated that under existing powers they are more than prepared to summarily dismiss them…Before it goes about seeking to increase those powers it is incumbent upon the government to at least test the limits of the existing powers and to demonstrate where they are deficient. What cases does the government say are not being dismissed

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5 *Submission 14*, p. 4.

6 *Submission 14*, p. 4.

7 Submission *19*, p. 8.

8 Submission *19*, p. 8.

9 Submission *1*, p. 1.

10 *Committee Hansard*, 13 April 2005, p. 20.

> summarily that should be dismissed summarily? Tell us the details and nature of those cases and explain how the interests of justice are served by having those cases dismissed without a full hearing.[11]

3.9 Further, QPILCH and SBICLS submitted that the summary dismissal provisions in the Bill were perplexing since the Federal Government has rarely sought summary dismissal of migration cases in the Federal Court but, in cases where it has pursued summary dismissal, has enjoyed high rates of success.[12] They noted that their research shows that there have been 'only four cases where the Minister sought summary dismissal, and the Minister was successful in three of those cases'.[13] At the hearing, Ms Kidson from QPILCH told the committee that her own research indicated that:

> …out of about 450 decisions made by the full court…around 55 or 60 [were]…cases that would probably have been amenable to summary judgment. They were cases where the applicant never at any stage really articulated a case, did not submit any further material, was unrepresented and often did not appear at a hearing, yet those were cases that were allowed to proceed to a final hearing. I cannot say why that happened. Again, it seems to be in contrast to the practice in the Federal Magistrates Court. Otherwise, that is a question that only the government could answer.[14]

3.10 Therefore, QPILCH and SBICLS argued that it could be inferred that:

> It is…the apparent under-utilisation of the existing summary dismissal procedures - rather than any inadequacy in the powers themselves - which has contributed to the problem of grossly unmeritorious cases proceeding to a full hearing.[15]

3.11 Ms Debra Mortimer, representing the Public Interest Law Clearing House (Vic) and the Victorian Bar offered an explanation as to why the powers of summary dismissal are rarely invoked by the Minister:

> All federal courts have summary dismissal provisions as a matter of course. They are rarely invoked by the minister in these kinds of proceedings. If one asks why, then in my experience the answer is that it is because it is not possible to say independently and confidently that a case is manifestly hopeless. Anglo-Australian law has long respected, considered and entrenched an approach to letting people have access to the courts on the merits of their cases. The Bar and PILCH think that is an important principle that ought not to be cast aside. This area is littered with examples

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11 *Committee Hansard*, 13 April 2005, p. 20.

12 *Submission 11*, p. 14.

13 *Submission 11*, p. 12.

14 *Committee Hansard*, 13 April 2005, p. 21.

15 *Submission 11*, p. 14.

> where, if one proceeds on the law as it is today, one might say that a particular argument or claim is hopeless, and then a decision will come down tomorrow that will tell, for example, the full Federal Court that it is wrong.[16]

3.12 The Law Council of Australia (the Law Council) expressed its general reluctance to support any lowering of the standard for summary dismissal of proceedings and argued that:

> …if there is a problem being experienced in one area of immigration decision making, attention should be paid to that area, with consideration being given to the reasons behind the problem being experienced. There would appear to be no justification for heavy handed provisions that are of general application.[17]

3.13 At the hearing, Professor Mary Crock on behalf of the Law Council argued that:

> By introducing this legislation across all of the courts, I think the danger is that it looks as though the legislation is attempting to direct the courts to knock out cases at the risk, I think, of restricting a vital part of the judicial function.[18]

3.14 In its submission, the Law Council argued further that:

> The provisions are of particular concern in the context of proposals to deter unmeritorious appeals. The combined effect of the scheme proposed may be to stifle the development of the Common Law in the immigration area. The system proposed could have the effect of making it difficult for a lower court to consider a novel submission on a point of law where an adverse precedent has been set by a higher court.[19]

3.15 At the hearing, Professor Crock stated that this would have the effect of pushing cases up to the higher courts:

> It will have exactly the opposite effect to the one intended. The common law depends for its development on courts being allowed to consider cases that, on their face, may not look promising. Lower courts have to be able to consider matters and explore the avenues that are there.[20]

3.16 The Attorney-General's Department's response to the concern that the Bill would discourage novel or test cases was as follows:

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16 *Committee Hansard*, 13 April 2005, p. 35.

17 *Submission 21*, p. 9.

18 *Committee Hansard*, 13 April 2005, p. 10.

19 *Submission 21*, p. 9.

20 *Committee Hansard*, 13 April 2005, p. 10.

> The view of the government is that in novel and test cases there is always something arguable in the circumstances of the case, which means that the court would not be satisfied that there is no reasonable prospect of success. Accordingly, an adviser would not be at risk of a cost order in those cases and the summary dismissal provisions would not be activated. It is important to read these provisions in the context of a legal system with the key characteristic that all statutory provisions are subject to judicial interpretation and that this is an evolving process. That feeds into the construction of these provisions.[21]

3.17 Several submissions also pointed out that the Bill introduces new summary dismissal powers which appear to apply to *all* applications before the High Court, the Federal Court and the FMC, not just those relating to migration.[22] The Administrative Review Council noted that 'the short title to the Bill gives no indication of this dimension to the Bill, a situation only assisted to a degree by its long title'.[23]

3.18 The New South Wales Bar Association argued that the Bill should be clearer in defining the circumstances in which the courts should be able to summarily dismiss proceedings:

> …the opportunity now exists for greater specificity in the proposed provisions referred to above: much court time and parties' expense will be spared if the Parliament were now to make it clearer which of the range of meanings of the expression 'reasonable prospect of success' was intended. The matter has more particular significance in the present bill because the expression is also central to the provisions that impose new obligations on advisers and a new potential liability for costs orders against advisers in migration litigation.[24]

3.19 Ms Kidson from QPILCH agreed that the Bill lacks clarity, not only in relation to its summary dismissal provisions, but also with respect to the way in which other provisions in the Bill would operate:

> The bill changes the bar without defining it. I guess that is the other objection we have to the bill: with the summary dismissal provisions and with the same bar for summary dismissals applied to the potential liability for costs, it tells us that the bar we all know does not apply, but it does not tell us what the new bar is. So it tells us that all the court cases where there is talk about them being doomed to failure, having no real prospect of success et cetera, do not apply. It gives us absolutely no guidance as to what the new test is, and yet from the moment of commencement of the act lawyers—and who knows who else the bill is meant to be applied to,

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21 *Committee Hansard*, 13 April 2005, pp 46-47.

22 For example, see QPILCH and SBICLS, *Submission 11*, p. 7; Administrative Review Council, *Submission 6*, p. 2.

23 *Submission 6*, p. 2.

24 *Submission 20*, p. 3.

> because it is not limited to lawyers—are having to structure the advice they give and make decisions about who they help and who they do not help without any idea what this new bar is. It is ironic that a bill whose object is to reduce litigation contains so many ambiguous provisions that scream for judicial scrutiny. It is absolutely ironic.[25]

3.20 Ms Suhad Kamand from the Immigration Advice and Rights Centre agreed that the Bill, as a whole, contains very little guidance for those dealing with its practical repercussions:

> What the explanatory memorandum has said…is that there is an obligation to assess whether something has a reasonable prospect of success. The legislation tells us that it need not be hopeless or bound to fail for it to have no reasonable prospects of success, but the explanatory memorandum indicates that a greater degree of flexibility is given to the courts than has been in the case law to date. There is no guidance as to how flexible the courts should be or what should guide that flexibility. The intimidating nature of the legislation would have the effect of decreasing the willingness of practitioners to advise in this area until some case law is established that would set some parameters to these obligations.[26]

3.21 However, the Administrative Review Council (ARC) was of the view that 'there would be little risk of the courts interpreting the proposed summary judgment provisions rashly or without careful regard to countervailing access to justice principles'[27] since this area of law is one in which, 'having regard to fundamental principles of access to justice, the courts have traditionally trodden a careful path.'[28]

3.22 At the hearing, Mr Wayne Martin QC, President of the ARC, elaborated on the reasons for the ARC's support of the summary dismissal provisions in the Bill:

> The reason we support that expansion of the scope of summary judgment is that the principles concerning the traditional enunciation of the reluctance of the courts to dismiss a case without it being fully heard, as found in High Court cases like Dey and the Victorian Railways Commissioners and General Steel, evolved in quite a different era and quite a different litigious context, an era in which there was a lot less litigation and a lot less pressure on limited judicial resources. The world has changed significantly since those statements were made, in that there has been, relatively speaking, a torrent of litigation in all jurisdictions which has placed significant pressure on limited judicial resources. My own view is that that requires a reassessment of the principle to ensure that we are allocating those limited judicial resources as efficiently as possible. In that context, if a case has no reasonable prospect of success, it seems to us to be in everybody's

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25 *Committee Hansard*, 13 April 2005, p. 24.

26 *Committee Hansard*, 13 April 2005, p. 27.

27 *Submission 6*, p. 2.

28 *Submission 6*, p. 2.

> interests—the interests of the parties, the court and the public in the efficient allocation of the resources of the court—that the fact be recognised sooner rather than later.[29]

The committee's view

3.23 The committee acknowledges that extended powers of summary dismissal under the Bill represent a significant departure from the existing common law test. While the committee notes the comments of the ARC, in particular that the courts would in all likelihood exercise caution in relation to the extended power, the committee expresses its serious concerns in relation to such an extension. The committee also notes evidence that the courts' existing extensive powers of summary dismissal are rarely used. Therefore, the committee concludes that the broadened powers of summary dismissal must be subject to review by Parliament after an initial period of operation. To ensure that this occurs, the committee's view is that the Bill should be amended to provide that the relevant provisions of the Bill shall cease to have effect after 18 months of operation.

Recommendation 1

3.1 The committee recommends that the Bill be amended to provide that the proposed provisions in Items 7, 8 and 9 of the Bill that confer the broadened powers of summary dismissal are repealed at the end of 18 months from the date of their commencement.

Deterring 'unmeritorious' proceedings

3.24 The committee received evidence which expressed strong opposition to the provisions relating to the deterrence of 'unmeritorious' proceedings. For example, Ms Suhad Kamand from the Immigration Advice and Rights Centre told the committee that, at a fundamental level, the Bill is flawed because it assumes that since the Federal Government wins approximately 93 per cent of judicial review applications then it automatically follows that 93 per cent of cases are 'unmeritorious':

> We strongly object to the much used ill-defined and empirically unsupported assumption by those promoting the bill that the high volume of migration litigation is due primarily to unmeritorious migration litigation. In our view that sort of analysis is unhelpful and simplifies the causes of the high volume of migration litigation unfairly by reference to one cause.[30]

3.25 Ms Debra Mortimer, representing the Public Interest Law Clearing House (Vic) and the Victorian Bar commented on the inappropriate use of the word 'unmeritorious' in the Second Reading Speech and the Explanatory Memorandum to the Bill:

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29 *Committee Hansard*, 13 April 2005, p. 15.

30 *Committee Hansard*, 13 April 2005, p. 25.

> Our position on that is that it is a value laden word that is really inappropriate to use in this kind of situation. It is an especially inappropriate criticism when there is such a paucity of funding for representation of asylum seekers. People who are in this position are not the best judges of whether they have meritorious administrative law claims.[31]

3.26 In its submission, the Office of the United Nations High Commissioner for Refugees (UNHCR) argued that:

> …a cautious approach is warranted in seeking to reduce unmeritorious litigation in asylum cases. Measures that may have the unintended affect of discouraging applications that are not certain of success, but are nonetheless not abusive, may detract from what is currently a positive aspect of Australia's system.[32]

3.27 UNHCR also noted that since Australian migration law is complex, '(t)here is no "bright line" separating meritorious and unmeritorious court applications'.[33] Further:

> In UNHCR's view, it would be unfortunate if asylum seekers and their legal advisers were discouraged from applying to the Court in cases of this nature, particularly where the outcome may have implications not only for the individual, but also for asylum seekers in general, and may also serve to clarify the law. Similarly, summary dismissal of such cases would seem to be inappropriate. This issue could be addressed by amending the items in the bill that rely on the "no reasonable prospects of success" formulation, to make it clear that cases raising significant questions of law are not intended to be subject to those provisions.[34]

3.28 HREOC argued that the effect of the 'unmeritorious' provisions of the Bill could be devastating and may have the opposite effect to that intended in improving the efficiency of proceedings where litigation has already commenced:

> …this is one of the key things that we are concerned about—not only is that person deprived of legal advice but the court is deprived of somebody who can make sense of what is potentially a morass of facts that really require a lawyer to refine and present them in their proper order and in their proper form so that a court can apply the act to them and make sense of the application. So, in our view, the provision of legal advice potentially makes the proceedings more efficient. Insofar as the provisions of the bill lead in the opposite direction, that seems to have an undesirable result to us.[35]

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31 *Committee Hansard*, 13 April 2005, p. 34.

32 *Submission 3*, p. 2.

33 *Submission 3*, p. 2.

34 *Submission 3*, p. 3.

35 Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 6.

Personal liability for legal costs

3.29 Many submissions and witnesses expressed apprehension about the provision of the Bill dealing with personal liability for legal costs. Submissions and witnesses were concerned about the breadth of the provision and its potential capacity to create unnecessary apprehension for lawyers and others who assist, advise and act for disadvantaged clients in migration matters.

3.30 For example, QPILCH and SBICLS argued that:

> The provisions relating to personal liability for legal costs are highly ambiguous, needlessly broad, and have significant potential to discourage lawyers from representing and assisting applicants with complex or uncertain cases, particularly where legal services are required on a pro bono basis.[36]

3.31 Professor Mary Crock from the Law Council told the committee that there were two main problems with the costs order provision of the Bill:

> I think the point is that in other contexts the focus is on the cost order against somebody who is plainly responsible for the carriage of proceedings, namely, a solicitor on the record. There are two problems with this section of the bill. The first is that the cost order is tied to the definition of unmeritorious; it is not disconnected from the provisions relating to what constitutes an unmeritorious decision. The second aspect of it is its breadth and the fact that it does not just capture, if you like, the person who might have the carriage of litigation before a court. It covers any person.[37]

3.32 In evidence, Professor Williams agreed that the provision is an overly broad approach to addressing problems of protracted or unworthy judicial review litigation:

> In general, I support the idea of cost orders being available to courts in circumstances where there is an abuse of process or a range of other matters that ought to lead to special types of costs or even damages being awarded. The problem with this is that it does go far beyond the carefully constructed limits that have been imposed. I am concerned at the absence of an appropriate knowledge requirement on the person who might be 'encouraging' another person. It may be possible that something said without knowledge that might not be seen as normally giving rise to any legal consequences in this case might. You can imagine many circumstances where well-meaning people might make comments encouraging people, and it is not normally accepted that that should lead to these types of cost orders.[38]

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36 *Submission 11*, p. II.

37 *Committee Hansard*, 13 April 2005, p. 12.

38 *Committee Hansard*, 13 April 2005, p. 30.

3.33 The New South Wales Bar Association argued that the costs order provision contains no clarity:

> …there is no clarity in relation to the matters…reasonable prospects of success, 'encourage', 'proper consideration', 'purpose' and 'the objectives which the court process is designed to achieve'. The courts should not be left to work out the content of these expressions over time and to the prejudice of litigants and advisers.[39]

3.34 Further, the New South Wales Bar Association argued that a lawyer should not be penalised under the provision 'where a lawyer explains any weaknesses in the proposed migration litigation to his or her client but the client, having considered those weaknesses, decides to commence or continue the migration litigation'.[40]

3.35 Dr Ben Saul agreed that the provision could be interpreted broadly, but that the courts may also exercise caution in this area:

> I agree with the analysis that the word 'encourage' could be interpreted broadly. I think there is a real prospect that a court probably would interpret it as narrowly as it could, given the manifest problems that would arise. The word 'encourage' is used so broadly that you can imagine all sorts of situations that would be covered by it. Even forms of moral encouragement could be covered—for example, wishing somebody the best in their forthcoming litigation or encouraging them to continue with that litigation in the hope that it leads to a better life for someone. I think on a normal reading it could lead to the inclusion of those types of activities. As I say, it is possible a court would read it narrowly, but it may not work that way.[41]

3.36 Mr Wayne Martin QC, from the ARC, also conceded that the provision is very broad but, despite not expressly including certain protections and reassurances, would in all likelihood be interpreted narrowly by the courts:

> There is a reasonable basis for criticism of its breadth. The only constraints upon it are, firstly, the requirement that the litigation has no reasonable prospect of success and, secondly, that the person against whom a costs order is made must have a purpose which is unrelated to the objectives which the court process is designed to achieve. Viewing that with my lawyer's glasses on, I would read that as: pursuit of litigation for an improper purpose. That is why I give it a more constrained reading than a number of the submitters.[42]

3.37 Some constitutional issues were also raised in relation to this provision. For instance, Professor Williams told the committee that:

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39 *Submission 20*, p. 6.

40 *Submission 20*, p. 6.

41 *Committee Hansard*, 13 April 2005, p. 31.

42 *Committee Hansard*, 13 April 2005, p. 17.

> I am troubled by the possibility of a court making an order in a matter against people who are not parties to the matter and not normally seen as connected to the matter. I can see the possibility of constitutional issues arising from that in that it arguably extends beyond the power of the court to make orders beyond that group of people, particularly to people who clearly here would be third parties in that they do not actually have any active involvement in the litigation.[43]

3.38 The committee also received argument that the costs order provision may also be unconstitutional because it *directs* a court to consider whether a personal costs order should be made. The Co-ordination Committee, Refugee Action Coalition NSW argued that this would amount to 'an unconstitutional intrusion into federal judicial power'[44] since the Constitution 'delineates a clear separation of powers between the legislative and judicial branches of government'.[45]

3.39 Some of the possible adverse effects of the costs order provision were raised with the committee. QPILCH and SBICLS submitted that:

> The great irony, and tragedy, of the proposed scheme is that it will discourage representation in borderline or difficult cases – *the very cases that most require skilled advocacy* – and achieve very little in the way of reducing grossly unmeritorious litigation, given…that the overwhelming majority of applicants in unmeritorious litigation are self-represented.[46]

3.40 The Law Council agreed:

> In cases where applicants may have a case which rests on the boundaries of established law this will deter solicitors or legal services from taking these cases and testing the established law, and supporting possibly vulnerable and meritorious applicants because of the possibility of these financial penalties.[47]

3.41 Many submissions emphasised the capacity of the Bill to impact negatively on free legal advice regimes such as the pro bono scheme run by the Federal Court or by law societies, as well as on specialist immigration advice agencies.[48] The National Pro Bono Resource Centre contended that:

> …these amendments may operate as a significant impediment to access to justice for migration applicants, and will act as a disincentive to the provision of pro bono legal services for such applicants. Practitioners may be willing to act for a person without charging a fee, but may well be

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43 *Committee Hansard*, 13 April 2005, pp 30-31.

44 *Submission 2*, p. 5.

45 *Submission 2*, p. 5.

46 *Submission 11*, p. 16.

47 *Submission 21*, p. 10.

48 For example, see Law Council of Australia, *Submission 21*, p. 11.

> unwilling to expose themselves to what may be perceived as an enhanced risk of personal liability for doing so. These amendments are likely to have a 'chilling effect' on their willingness to provide pro bono legal services.[49]

3.42 The Federation of Ethnic Communities' Councils of Australia agreed:

> The possibility of imposing costs orders against lawyers and voluntary organisations will, we believe, discourage lawyers from conducting pro bono work, make it impossible for voluntary organisations and non government organisations to support people through judicial review processes and remove this important safeguard.[50]

3.43 The Law Society of South Australia expressed a similar view:

> The threat of costs orders is likely to result in pro bono efforts coming to a halt. The Commonwealth might think that this will give them an advantage in litigation but we submit that it will result in a huge upsurge in numbers of unrepresented litigants and increased burden on the judicial system with consequent delays. It will achieve the opposite to the outcome allegedly desired.[51]

3.44 Some submissions argued that voluntary organisations and lawyers acting on a pro bono basis should be exempted from the operation of this part of the Bill.[52]

3.45 However, the ARC disagreed with this view. At the hearing, its president, Mr Wayne Martin QC, offered this explanation for the ARC's assessment of the possible effects on the operation of pro bono legal services:

> The reason I disagree with the proposition that the mere passage of the bill will choke off that important resource is that I find it very difficult to conceive of a circumstance in which, under this bill, a pro bono lawyer who has acted in good faith would be at any appreciable risk of having a costs order made against him or her. I cannot see that a lawyer acting properly in accordance with our normal professional obligation and particularly in a pro bono context would be at any risk of a judicial order. It would only be the most extraordinary case and a case that would probably lead to the conclusion that the lawyer had acted unprofessionally. That is the only circumstance in which a costs order would be made.[53]

3.46 Mr Martin continued:

> If the bodies that have engaged in giving this service looked carefully at the legislation and applied it to the services they provide I think they would

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49 *Submission 12*, p. 4.

50 *Submission 5*, p. 5.

51 *Submission 4*, p. 3.

52 For example, see Law Society of South Australia, *Submission 4*, p. 3; Legal Services Commission of South Australia, *Submission 13*, p. 4.

53 *Committee Hansard*, 13 April 2005, pp 16-17.

> come to the conclusion that they would be at no appreciable risk of an order—especially in the pro bono context. I can imagine a judge taking a harsher view of a lawyer who was motivated by profit in pursuing a case that had no reasonable prospect of success. A pro bono adviser cannot have that motive.[54]

3.47 At the hearing, a representative from the Attorney-General's Department argued that pro bono lawyers are not at risk of cost orders if they are acting properly and in accordance with their professional obligations:

> The government's view is that whether pro bono assistance has been provided or the lawyers are acting for a fee, lawyers who present properly prepared arguments, including raising novel arguments, have no reason for concern if they have given proper regard to the law and facts as they apply in these individual cases, so that pro bono lawyers are at no disadvantage under these provisions.[55]

3.48 Some submissions and evidence expressed the view that there were existing ways in which the Federal Government could seek to deter engagement in 'unmeritorious' litigation, namely through broader professional conduct obligations. As Ms Debra Mortimer SC from the Public Interest Law Clearing House (Vic) and the Victorian Bar argued though, it would be imperative as a starting point, to ascertain precisely to whom the personal obligation and penalty provisions in the Bill are principally directed:

> If they are principally directed towards, for example, counsel, I think that is offensive, completely unnecessary and does not reflect how counsel practise in this area. If they are directed towards lawyers in general, my experience, again, is that I do not know of lawyers that support or continue migration litigation for secondary purposes or anything like that. If there is evidence of that then perhaps something needs to be done. But the point is that there may be other ways in which one ought to attack individual lawyers who are supporting those kinds of practices, and that is through their professional conduct obligations—and the same with migration agents. If it is directed to a different category of person—people that are standing behind applicants—again, I am not aware from my experience of any evidence of that being the case.[56]

3.49 Others also supported the view that the costs order provision is unnecessary. For example, ALHR submitted that:

> Lawyers are already bound by a professional obligation and a duty to the Courts not to pursue causes of action that have no reasonable prospects of success. The imposition of specific costs orders appears aimed at

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54 *Committee Hansard*, 13 April 2005, p. 17.

55 *Committee Hansard*, 13 April 2005, p. 47.

56 *Committee Hansard*, 13 April 2005, p. 36.

> intimidating lawyers rather than improving access by asylum seekers to proper legal advice as to the merits of their claim.[57]

3.50 Similarly, Ms Nitra Kidson from QPILCH told the committee that:

> In relation to the imposition of liability for legal costs, again we do not believe the government can point to any evidence that lawyers and other persons are encouraging applicants to abuse the legal system. The explanatory memorandum talks about advisers operating behind the scenes, but I have to ask: how does the government know what goes on behind the scenes?...Where there is abuse by practitioners, if it can be identified as a matter of reality not as conjecture, the courts already have a general discretion to award costs personally against lawyers and they have done so in the past where they have been satisfied it is appropriate. There are professional bodies whose job is to deal with any systemic conduct which is unprofessional or unbecoming. Migration lawyers, particularly, are probably the most regulated lawyers in the country because they are subject to both their own state law societies as well as the national migration agents authority.[58]

3.51 ALHR suggested that a more preferable way of combating the perceived problem might be to change the restrictions on representation of migration claims:

> Qualified solicitors cannot provide any advice under the *Migration Act 1958*, even on a *pro bono* basis, unless they are a registered migration agent. However, anyone can become a registered migration agent after a short—but expensive—course that does not necessarily equip people to deal with the complexities of refugee law.
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> A preferable system would be to have lawyers with specialist training in representing asylum seekers conducting all asylum seeker cases (other than those where the claimant is unrepresented).[59]

3.52 However, despite acknowledging some concerns about the breadth and effect of the costs order provision, Mr Wayne Martin QC from the ARC told the committee that, in his view, the courts would exercise caution in interpreting it:

> On balance, we came to the conclusion that one could have some confidence that the court in implementing these provisions would act sensibly and in a reserved way and would not exercise the power to award costs against a third party other than in an appropriate case, which would essentially be a case involving some significant element of abuse and culpability on the part of the person against whom the costs order is made.[60]

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57 *Submission 19*, p. 1.

58 *Committee Hansard*, 13 April 2005, p. 21.

59 *Submission 19*, pp 6-7.

60 *Committee Hansard*, 13 April 2005, p. 16.

3.53 At the hearing, the committee questioned the Attorney-General's Department and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) in relation to concerns raised during the inquiry such as perceptions that the Bill is an attack on the legal profession; the breadth of the provision; the uncertain practical impact of the provision; and the necessary steps that should be taken to minimise the risks of being caught by it.

3.54 The representatives sought to clarify the operation of the provisions. For example:

> The provision has a number of conditions in it for it to operate and, as you say, it is expressed in terms that a person must not encourage the litigant to commence or continue migration litigation. In the government's view, merely advising a person about their prospects of success—or examining their case to ascertain what their prospects of success are and to advise them of them—is not encouraging them to pursue litigation. Encouraging a person is urging or advising or assisting them to actually do something. In this case it is to actually commence or continue litigation, as distinct from advising them about the prospects of their case. So if a person does take it upon themselves to actually encourage or urge a person to pursue litigation, the person does have an obligation imposed by this provision to consider whether or not there are reasonable prospects of success and to give proper consideration to the prospects of success in a case.[61]

3.55 The representatives also drew the committee's attention to the fact that the Bill gives a person the opportunity to argue why a costs order should not be made and inform the court of their precise role in the relevant proceedings.[62] They also emphasised the need for evidence of the nature of the person's involvement in the proceedings:

> As to the extent to which they help and assist and encourage, the issue that very much comes out here is precisely what they have done in the circumstances and whether the court believes it appropriate in the circumstances to make that costs order. An important safeguard that is in the bill, of course, is proposed section 486G—that before a costs order can be made, the court has to give the person an opportunity to argue why it should not be made. So they do have the opportunity to come and explain precisely what their role is. If it is a situation where they have merely provided some advice that there is this capacity to go to a court, without making any judgements or taking it further to actually directing the person to the court—and it can happen at times that they do direct these people to the court—then, once again, given the court's cautious approach to these matters, it is unlikely that a costs order would be made. [63]

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61 *Committee Hansard*. 13 April 2005, p. 43.

62 *Committee Hansard*, 13 April 2005, p. 44.

63 *Committee Hansard*, 13 April 2005, p. 44.

3.56 The departmental representatives were also questioned on how the provision would apply to non-legally trained or experienced persons who 'encouraged' an applicant to bring a case. The committee was concerned as to how non-lawyers - such as volunteers working at a refugee support centre - could make an appropriate assessment of the reasonable prospects of success of a legal case and, thereby, avoid the risk of having cost awarded against them. The representatives argued that:

> …[there is] a distinction between a person who is actually encouraging this particular litigation and a person who is advising a person on the process, advising a person that there is this possibility, but not encouraging that person to pursue that specific litigation. In general a person who is advising like that will be saying: 'This is how you go about it. It is up to you to work at whether you have a chance of success in this litigation.'[64]

3.57 Notwithstanding this, the committee fails to see how any court could reasonably be expected to determine that a non-legally trained or experienced volunteer at a refugee centre can adequately appreciate the reasonable prospects of success in the court case. The committee also remains concerned that the practical result of the proposed provisions will be to discourage people from helping refugees and migrants. This is notwithstanding assurances by departmental representatives that this is not the Federal Government's intention.

Certification requirement

3.58 Many submissions and witnesses were highly critical of the certification requirement in the Bill and its interaction with the provisions relating to personal liability for costs. For example, Ms Debra Mortimer SC, representing the Public Interest Law Clearing House (Vic) and the Victorian Bar (herself a barrister working with asylum seekers in judicial review proceedings), gave the committee an insight into the practicalities of migration law cases:

> It is really inappropriate to ask lawyers to make a judgment about reasonable prospects of success in this area at the moment when a proceeding is issued. That is for a number of reasons. It has to do with the fluidity of the law itself in this area; but it also has to do with the reality of the way litigation is conducted. For drafters of these provisions to ask for such a certification, I think just demonstrates that they have no idea what happens in practice in this area. You do not sit down with these clients and have comfortable long conversations over days and weeks. You do not have access to all the information that was before the tribunal. Sometimes you might only see the RRT [Refugee Review Tribunal] decision the day before the time limit is about to run out. You cannot make a judgment of that kind in those kinds of circumstances; that is not to say that that judgment is not made. In my experience it is made regularly, carefully and bona fide. And it is made before the trial, in my experience, by counsel who appear for applicants, but you cannot necessarily do it on the day that you issue the

64 *Committee Hansard*, 13 April 2005, p. 45.

> application. To impose that onerous responsibility on lawyers I think is highly inappropriate.[65]

3.59 Further, Ms Mortimer told the committee that, in her experience, lawyers and barristers do their utmost to ensure that proceedings in which they are involved are not 'unmeritorious':

> I do not have any experience of lawyers who have continued cases that they think are manifestly hopeless. In fact, I have the opposite experience. I have experience regularly of junior counsel ringing me to have anxious discussions about how they are going to tell clients for whom they are acting pro bono that they cannot continue to act for them because, having looked at all the material, they are not able to say that they have an arguable point. My experience in practice is that lawyers do precisely the opposite of what this bill in these provisions contemplates they do.[66]

3.60 QPILCH and SBILCS noted that the Bill 'does not appear to contemplate the scenario where a lawyer's view of the proceedings changes subsequent to giving the certification'.[67] In particular:

> …*if strict time limits are imposed*, migration proceedings must often be commenced prior to an applicant's file becoming available under Freedom of Information legislation, and before a transcript of tribunal proceedings can be prepared. It is quite possible that a lawyer's view of the merits of an application will change throughout the progress of the case as more information comes to light. If a client's case is perceived to weaken, will the lawyer be obliged to withdraw their representation, notwithstanding the resulting prejudice to the client? Does the lawyer have to withdraw the certification previously given?[68]

3.61 QPILCH and SBILCS also pointed out '(t)here will be many situations in which an application will have reasonable prospects of success, but where the litigation is nevertheless justified'.[69] Furthermore, the test is an objective one and, as Ms Kidson from QPILCH argued in evidence, 'the minister and the courts get the benefit of hindsight, the benefit of full argument, the benefit of all the evidence to make that judgment and to penalise the applicant's lawyer for failing to arrive at the same conclusion as themselves'.[70]

3.62 Ms Suhad Kamand from the Immigration and Rights Legal Centre told the committee that this was unrealistic:

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65 *Committee Hansard*, 13 April 2005, p. 35.

66 *Committee Hansard*, 13 April 2005, p. 35.

67 *Submission 11*, p. 18.

68 *Submission 11*, p. 18.

69 *Submission 11*, p. 19.

70 *Committee Hansard*, 13 April 2005, p. 23.

> The risk is when circumstances change after provision of the certification. When looked at together with the strict time limits, practitioners will have in effect less than 28 days to fully assess a case and provide a certification. A freedom of information request takes around three to four months to process. So the limitation periods, when looked at together with the certification and the obligations on practitioners at the early stages of contemplating litigation, are just unrealistic.[71]

3.63 The Law Council's view of the certification requirement was as follows:

> The Law Council has consistently expressed the view that legislation requiring the certification of proceedings should be carefully framed to ensure that fear of the risks of failure in litigation of a case which, for example, may seem hopeless on the current state of the law should not prevent the bringing of that litigation where it is proper to test the limits of what might otherwise be thought to be settled law. It can be expected that the courts will exercise the power conferred on them by such sections judicially and not capriciously. However, the controversy surrounding the conduct of migration litigation in recent years suggests that if the Bill is passed, it is in the field of migration law that the scope of the solicitor's certificate, the solicitor's duty on giving such a certificate and the concept of "unmeritorious litigation" is likely to be given flesh and substance.[72]

3.64 The Law Council also made the point that if the Federal Government's concern is 'unmeritorious' litigation in a broad sense, then certification provisions should apply across all jurisdictions. Otherwise the insertion of such provisions in just one area 'creates the impression that the government is trying to drive lawyers out of immigration cases'.[73]

The committee's view

3.65 In the committee's view, the evidence presented by representatives from both the Attorney-General's Department and DIMIA did little to allay concerns raised in relation to the 'unmeritorious' proceedings provisions of the Bill. In particular, the representatives were not able to adequately explain how these provisions would operate in practice, nor how people would be able to determine whether in fact their actions are covered by the Bill.

3.66 The committee remains concerned that too many terms in the relevant provisions are undefined and therefore have the potential to operate extremely broadly. This would in turn create considerable uncertainty for those dealing with the practical operation of the Bill, including barristers, lawyers (including those lawyers working on a pro bono basis), and not-for-profit immigration and community organisations.

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71 *Committee Hansard*, 13 April 2005, p. 28.

72 *Submission 21*, p. 10.

73 *Submission 21*, pp 10-11.

3.67 The committee is also mindful of evidence suggesting that one of the major adverse impacts of the Bill would be the reluctance of people to assist others with judicial review applications due to the threat of a costs order being made in the future, as well as 'certification' requirements that seemingly do not take into account the realities of work in this area. The committee notes arguments that serious long-term consequences could be the result of such measures.

3.68 The committee's view is that, subject to the recommendations made elsewhere in this report, the regime proposed by the Bill ought to be allowed to operate for a relatively short period after which its operation and impact can be reviewed and evaluated. To this end, a report on the first 12 month's operation of the Act should be prepared and presented to Parliament. This report will, among other things, inform Parliament's consideration of any amendments to extend the operation of the summary dismissal powers beyond 18 months (see Recommendation 1 above).

Recommendation 2

3.2 The committee recommends that the Bill be amended to insert a requirement that, as soon as practicable after the end of 12 months from the date of the Bill's commencement, the Minister must cause to be laid before each House of Parliament a comprehensive report on the operation of the provisions of the Bill.

Imposition of time limits for judicial review

3.69 The issue of time limits for judicial review applications was raised in the committee's inquiry into the Judicial Review Bill in 2004.[74] The committee examined this issue in detail in the course of that inquiry and, accordingly, will only deal briefly with it in the current report.

3.70 Many submissions and witnesses expressed opposition to the notion of time limits for judicial review applications. While not objecting to the issue of time limits per se, many argued that the Bill should contain discretion to extend time limits in cases where the interests of justice require it.[75] Further, some contended that there is little evidence suggesting that matters commenced in or out of time are more or less likely to be meritorious.[76]

3.71 The Refugee and Immigration Legal Centre (RILC) submitted that it was 'fundamentally opposed to the provisions of the Bill which…seek to introduce a

74 See Senate Legal and Constitutional Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004, pp 16-24.

75 See, for example, Mr Craig Lenehan, HREOC, *Committee Hansard*, 13 April 2005, p. 4.

76 See, for example, Mr Jonathon Hunyor, HREOC, *Committee Hansard*, 13 April 2005, p. 6.

regime of strict, non-extendable time limits for applicants seeking judicial review of migration decisions'.[77] RILC also contended that:

> …the Bill fundamentally fails to properly distinguish between meritorious and unmeritorious applications for judicial review by applying the non-extendable time limits to all applicants. All will be caught by the provisions regardless of the merit of the case or reasons for delay. In our submission arbitrary and absolute time limits are a crude and inflexible instrument inherently incapable of operating fairly and doing justice in many circumstances.[78]

3.72 Mr Jonathon Hunyor from HREOC outlined its concerns as follows:

> The bill proposes, in effect, an absolute time limit of 84 days. The commission submits that there is no sufficient reason to deny an extension of time beyond this period where the interests of justice require it. To do otherwise is, with respect, to make a clear and conscious decision to put efficiency before justice. The commission submits that parliament ought not to do so, especially where there is a potential for refoulement in which the stakes are potentially life and death. Cases commenced out of time are not necessarily lacking in merit, and courts have made it clear on a number of occasions that strict time limits may result in justice being denied…[79]

3.73 The Federation of Ethnic Communities' Councils of Australia agreed:

> Time limits must be flexible enough to ensure that litigants are able to access information to support their claims for permanent residence, and to effectively brief their legal representatives. We therefore have some real concerns that the time limits proposed under…the Bill will prevent some applicants form exercising their right to judicial review.[80]

3.74 The committee also received evidence questioning the constitutional validity of imposing non-discretionary, absolute time limits for the judicial review of migration decisions since the time limit would operate in cases where the applicant could otherwise successfully argue that a decision is infected with jurisdictional error and that, at law, no decision under the Migration Act has been made.[81]

3.75 The Co-ordination Committee, Refugee Action Coalition NSW submitted that:

> …the proposed legislative changes attempt to confine judicial review by placing a defined time limit on migration appeals. Thus we believe these

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77 *Submission 23*, p. 4.

78 *Submission 23*, p. 4.

79 *Committee Hansard*, 13 April 2005, p. 2.

80 *Submission 5*, p. 4.

81 For example, see QPILCH and SBICLS, *Submission 11*, p. I; Public Interest Law Clearing House (Vic) and the Victorian Bar, *Submission 15*, p. 11.

proposed changes are unconstitutional under section 75(v) for the very reason they are being proposed; they limit judicial review.[82]

3.76 The Law Council made a similar argument:

It is suggested that, as far as the High Court provisions in section 486A of the *Migration Act* are concerned, these may be unconstitutional as they restrict the jurisdiction of the High Court in section 75(v) of the *Constitution*. Insofar as the jurisdiction in section 75(v) was intended to be a broad power to allow the High Court to deal with substantive matters of justice, it is suggested that these provisions may restrict access to justice in the High Court.[83]

3.77 And further:

This question may then be broadened to ask whether the mirror provisions for the Federal Magistrates Court and the Federal Court may not also restrict access to justice and in some cases leave an applicant with no recourse to the judicial system following their Tribunal decision. The ultimate effect of rigid time limits may again be to force applications in the original jurisdiction of the High Court, further delaying the hearing of cases in that Court.[84]

The committee's view

3.78 The committee repeats the views expressed in its report on the Judicial Review Bill in relation to time limits and makes no additional comments on this issue.[85] However, the committee acknowledges that its recommendation from that report with respect to actual (as opposed to deemed) notification of decisions[86] has been taken up by the Federal Government in the current version of the Bill.

Constitutional validity of a 'purported privative clause decision'

3.79 The background to the extended definition of privative clause matters is well known to the committee and was canvassed in detail in the committee's inquiry into the Judicial Review Bill.[87] The committee does not propose to examine this matter again in detail in the current inquiry. The next section of the report will deal briefly with the main issues raised in relation to privative clauses in this inquiry.

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82 *Submission 2*, p. 4.

83 *Submission 21*, p. 11.

84 *Submission 21*, pp 11-12.

85 Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004, p. 22.

86 Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004, pp 24 and 30.

87 Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004, pp 3-5 and pp 14-16.

3.80 Several submissions and witnesses objected to the perceived further restriction on the ability of applicants in migration matters from accessing judicial review, particularly through the Bill's use of privative clauses.[88]

3.81 For example, the Migration Institute of Australia contended that:

> …the proposed definition of a purported decision is so broad as to reduce the ability for people to know that a reviewable decision or action has been made and they need to lodge an application for review, and…this may lead to lodgement of 'precautionary appeals' leading to a conflict between the ability to adhere to strict time limits and the prohibition on appealing if there is 'no reasonable prospect of success' linked to personal costs.[89]

3.82 Many others agreed with this assessment. At the hearing, Professor Mary Crock from the Law Council expressed strong ideological opposition to the use of the privative clause device:

> The High Court of Australia has made it patently clear that the Australian Constitution contains guarantees that cannot be ousted by parliamentary enactment. These guarantees are contained in sections 73 and 75 of the Constitution. They provide that the judicial power in Australia is to be exercised by a federal court, known as the High Court, and that as an irreducible minimum the High Court is to have the power or jurisdiction to review actions taken by an officer of the Commonwealth. These provisions embody the notion that the rule of law in this country involves the power of parliament and of the executive being balanced by the oversight of the court. This means that if a court says that either legislation or administrative action stands outside the law it should be subject to judicial correction. In its reference to purported decisions—I know very few decisions are caught by this—the legislation attempts to preclude the review of decisions affected by the jurisdictional error, and it says that in the legislation. I find it hugely distressing that parliament would purport to put words like that in an enactment given the terms of the Constitution.[90]

3.83 The Law Council's submission also raised an interesting point regarding the privative clause provisions in the Bill:

> On one level, there seems to be an irony in introducing provisions to limit judicial review that will encourage litigation: once again the High Court will be asked inevitably to rule on the effect of the amendments. On the other hand, it is difficult to see that the amendments will have any effect at all on the ultimate jurisdiction asserted by the High Court (and through it, the lower Federal Courts).[91]

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88 See, for example, Legal Services Commission of South Australia, *Submission 13*.

89 *Submission 8*, pp 6-7.

90 *Committee Hansard*, 13 April 2005, p. 9.

91 *Submission 21*, p. 13.

3.84 ALHR agreed that any '(f)urther tinkering with the privative clause is likely to lead to further complex litigation to tease out the actual effect of the privative clause'[92] and that 'there will be no marked "efficiency" in moving the cases as it is clear that the High Court's jurisdiction cannot be ousted'.[93]

3.85 Professor Williams and Dr Saul expressed a similar viewpoint:

> …the application of privative clauses to migration decisions involving noncitizens undermines the principle of equal treatment that is fundamental to the rule of law and the common law, and may infringe the human right to freedom from non-discrimination. The idea of equality before the law demands that Australia's justice system, including the basic right of judicial review of administrative action, must extend to all persons within Australia's jurisdiction, regardless of their status.[94]

3.86 The committee also received evidence arguing that the reference to a 'purported privative clause decision' in the Bill is contradictory in seeking to regulate something that is not a decision at all. For example, in their submission, Professor George Williams and Dr Ben Saul contended that the amendment might be invalid because it might not be seen as a 'law' that could be enacted by Parliament under section 51 of the Constitution.[95]

3.87 At the hearing Professor Williams elaborated on this point:

> I am concerned about the very idea of providing a legal framework for the regulation of a purported decision. It seems to be a strange thing to do indeed, within a legal framework that is meant to be compliant with the rule of law, to seek to regulate something which, by its very nature, is illegal or an unlawful decision. In terms of the constitutional problems that might flow from that, significantly this does not make such decisions unreviewable. If it did, I think it is very likely that the bill would have been unconstitutional as a result of the decision in Plaintiff S157, but clearly a sensible decision has been made not to go down that path. However, there are further, less likely problems with the legislation, even in its current form. The mere idea of regulating a purported decision may give rise to a question about whether the regulation is a law at all, as is required by section 51 of the Constitution. There are some fairly oblique references to that idea in that recent High Court decision.[96]

3.88 However, at the hearing, Mr Wayne Martin QC from the ARC expressed the view that the insertion of the term 'purported privative decision' in the Bill was purely mechanical:

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92 *Submission 19*, p. 7.

93 *Submission 19*, p. 7.

94 *Submission 14*, p. 4.

95 *Submission 14*, p. 4.

96 *Committee Hansard*, 13 April 2005, pp 29-30.

> My own view…is that I thought this ground was covered pretty much by the bill that lapsed with the parliament last year. My impression of it was that the effect of the introduction of the definition was largely mechanical and procedural to overcome what might have been an unintended consequence of the High Court's decision in S157. As I read the provisions of the bill—and I may have misread them—both that bill and, to the extent the provisions have been carried forward in this bill, this one, it was not intended by that definition to attempt to, as it were, resurrect the scope of the privative clause that was emasculated in S157 but, rather, to apply that decision to some of the mechanical provisions of the bill relating to time limits and so forth.[97]

3.89 A representative from DIMIA informed the committee that it had sought legal advice on the constitutional validity of the Bill and also argued that the insertion of the privative clause provisions was procedural, rather than a restriction on judicial review:

> …the advice that we had is that it would be constitutionally valid. It is on the basis that it does not change the grounds of review. It deals primarily with, and its purpose and focus are on, the procedural aspects. The Migration Act in its current form has a series of time limits and provides for the exclusive jurisdiction of the federal courts in relation to privative clause decisions. The effect of the High Court's decision is that the privative clause decision, in effect, is a decision that is not tainted by jurisdictional error. The consequence is that, in order for the court to ascertain whether or not the person is within time limits, they have to conduct a complete judicial review. The purpose behind the amendment relating to a purported decision is to say that, in effect, any action or decision that is taken or purportedly taken under the Migration Act comes within those procedural requirements, such as the time limits, the primary decision restriction and also the exclusive jurisdiction of the federal courts.[98]

3.90 Further, the representative noted that his understanding was that there was far greater confidence that the current version of the Bill is constitutionally valid as opposed to the Judicial Review Bill, due to amendment of the current Bill to include this committee's recommendation from its previous report:[99]

> In the form that is in the bill, of course, the government has taken up the committee's recommendation in relation to the earlier proposed provision that operated from deemed notification. This is from actual notification. So I understand that there is far greater confidence that this is constitutionally valid because of that actual notification provision. You will not have the situation where, potentially under the deemed notification provision, a person may not have been aware or they may have only become aware of the decision somewhere within that broadly 84-day period. Here they will

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97 *Committee Hansard*, 13 April 2005, p. 18.

98 *Committee Hansard*, 13 April 2005, p. 39.

99 See further Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004, p. 30.

> in fact have the 84-day period from actually knowing about the decision and having the reasons for that decision in which to seek judicial review.[100]

The committee's view

3.91 The committee accepts DIMIA's assertion that the purpose of the 'purported privative clause' device in the Bill is merely procedural, seeking only to apply time and jurisdiction limits to 'purported' decisions under the Migration Act and not bar review of such decisions. The committee repeats the views expressed in its report on the Judicial Review Bill in relation to privative clauses and makes no additional comments on this issue.

Possible alternative approaches

3.92 Many submissions and witnesses acknowledged the attempt in the Bill to improve the efficiency of court processes in relation to migration matters. For example, Ms Kidson from QPILCH, applauded the proposed changes to the structure of the jurisdiction of the courts:

> We have said that we have no objection to [giving the High Court power to remit on the papers], provided that safeguards are in place—provided, for example, that the High Court retains the power to hear old submissions if it believes it is necessary and if one of the parties makes a case for that. We have stated that we have no in-principle objection to the Federal Magistrates Court becoming the primary judicial jurisdiction for hearing cases—again, provided it retains the discretion, which under the bill it currently does, to refer complex cases to the Federal Court.[101]

3.93 Ms Suhad Kamand from the Immigration Advice and Rights Centre agreed that the Bill's aim has some merit:

> We share the concerns expressed by those promoting the bill regarding the high and increasing volume of migration litigation and the delays in, and burdens on, the migration determination process which result. We share the objective of increasing efficiency and expedition in the migration determination process, but only to the extent that the quality, fairness, integrity and constitutionality of that determination are preserved.[102]

3.94 However, the committee received considerable evidence expressing strong opposition to the way in which the Bill seeks to achieve this aim. This evidence pointed to the failure to address or seek to implement structural reforms which are deemed to be at the core of problems in the use of the judicial review process in Australia, particularly in relation to migration matters.[103]

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100 *Committee Hansard*, 13 April 2005, pp 39-40.

101 *Committee Hansard*, 13 April 2005, p. 22.

102 *Committee Hansard*, 13 April 2005, p. 25.

103 For example, see RILC, *Submission 23*, p. 3.

3.95 Many also criticised the Federal Government's continued failure to release the Penfold Report for scrutiny and comment, particularly in light of the fact that the Report contains the evidence and findings which form the basis of the Bill.[104] In its report on the Judicial Review Bill, this committee urged the Federal Government to release the Penfold Report for public comment before seeking to further amend the Migration Act.[105] The report also stated that the committee would have been in a better position to comment on the Judicial Review Bill if the Penfold Report had been available at the time of its inquiry.[106] The committee reiterates its concerns here.

3.96 The Law Society of South Australia argued that, although the Federal Government has refused to make available the Penfold Report, a few presumptions can be made from the Bill:

> In seeking to reduce the number of matters before the courts, the government response has focussed on implementing barriers and restrictions on the judicial process. It has failed to consider the structural reasons behind the problem. In particular, it has failed to introduce measures designed to improve the quality and transparency of primary decision making. It has also failed to address the consistency, quality and transparency of both the Migration Review Tribunal and the Refugee Review Tribunal. Further, the government has made no proposals designed to strengthen the availability of legal advice and assistance, whether pro bono or otherwise, to applicants before the tribunals leaving some of the most vulnerable members of society to attempt to represent themselves in these matters.[107]

3.97 The committee notes advice by a representative of the Attorney-General's Department at the hearing for this inquiry that 'the report was prepared for the government and for the purposes of a cabinet decision and that therefore it would not be released apart from the limited material that has been provided to the committee'.[108] However, the committee restates its view that availability of the Penfold Report would have greatly assisted its assessment of the merits and adequacy of the current Bill and its objectives.

3.98 The committee heard that alternative measures to those taken in the Bill would be more successful in addressing the problems relating to judicial review of migration proceedings in Australia. Dr Ben Saul told the committee that:

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104 For example, see Ms Debra Mortimer, Public Interest Law Clearing House (Vic) and the Victorian Bar, *Committee Hansard*, 13 April 2005, p. 34; Refugee and Immigration Legal Centre, *Submission 23*, p. 3.

105 Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004, p. 12.

106 Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, June 2004, p. 30.

107 *Submission 4*, p. 1.

108 *Committee Hansard*, 13 April 2005, p. 38.

> …we take a very different approach to how you should respond to this problem of judicial review being manipulated. Rather than taking a punitive approach by closing down avenues of appeal and imposing cost orders, we think it is preferable instead to address the root causes of why so many applicants seem to be using judicial review as a means of seeking asylum but yet being quite unsuccessful.
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> …
>
> ...maintaining a system of mandatory detention and detaining people while their asylum applications are being processed clearly creates an incentive for detainees to try to get out of detention in any way possible, including through judicial review applications, when they do not have much hope of succeeding.[109]

3.99 Many argued that the Bill sought to achieve its objectives at the expense of fundamental rights and access to justice. For example, Ms Suhad Kamand from the Immigration Advice and Rights Centre told the committee that:

> We have strong concerns regarding the potentially far-reaching effect of the bill on access to migration legal services and the likelihood that it will result in an increase in highly vulnerable socioeconomic groups, often with poor English language skills and little if any understanding of the Australian migration law and processes, representing themselves in complex migration litigation. We are concerned that, while having the potential to significantly decrease access and equity in relation to migration litigation or migration legal services, the bill does little to ensure that its stated objectives of increasing efficiency and minimising unmeritorious claims will be achieved. Indeed it is our view that the measures the bill seeks to put in place will defeat these objectives by decreasing access to sound legal advice and representation, prompting a rise in unrepresented litigants and inviting judicial scrutiny at the application and intent of the ill-defined, onerous and far-reaching obligations and penalties proposed.[110]

3.100 The Law Council submitted that 'the Bill will not succeed in its stated aims, but is likely to make a bad situation worse'.[111] In particular:

> …the Law Council is concerned that problems in one area of migration decision making – refugee appeals – are driving reforms that impact on the rights of all migration applicants, stifling opportunities to challenge decisions and hampering the courts in their development of immigration jurisprudence.
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> It is the Council's view that Parliament has again been invited to focus once again on the wrong end of the process: trying to stifle review instead of addressing the question of why so many appeals are being lodged.[112]

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109 *Committee Hansard*, 13 April 2005, p. 29.

110 *Committee Hansard*, 13 April 2005, p. 25.

111 *Submission 21*, p. 7.

3.101 At the hearing, Professor Mary Crock, representing the Law Council, was highly critical of the approach taken in the Bill:

> It is our view that this legislation is contemptuous of the notion of the separation of powers in this country. Like the migration legislation reform enactments that have preceded it, it is ill-conceived, of questionable constitutionality and is likely to have effects that are unintended and are detrimental to both the legal process and the rule of law in Australia. This bill is yet another attempt to oust the judicial review of migration decisions, but it goes further than that. It touches the judicial process generally in the federal area. Whereas on the last occasion the attack was on the courts themselves, this time the approach is two-pronged and involves an attack on the courts and an attempt to discourage and penalise those in the community responsible for bringing judicial review applications.[113]

3.102 Further, Professor Crock stated that Australia has 'one of the smallest bodies of refugee claims in the world' yet also has 'one of the most astonishing proportionate load of cases in the courts'.[114] She argued that efforts should be made to determine why this the case:

> Perhaps we need to stand back and look more holistically at the system and what is going wrong.
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> ...
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> If you have people who are not being looked after and they are not being captured, if you like, by people who are going to look after their cases properly, these people will end up making unmeritorious—or apparently unmeritorious—applications. But in fact they are people who are in dire need of assistance and who have good claims that have never been properly articulated. It is a systemic failure that this is really not addressing. That is the point I would like to make.[115]

3.103 Mr Craig Lenehan from HREOC expressed a similar view:

> The question that arises for us is: where does the problem really lie? That is an issue that is raised not just in our submission but in other submissions. Do you answer that problem by cutting off people's rights to bring cases that may very well result in them being awarded protection visas or do you look at more fundamental aspects of the problem, which include the matter that you have referred to which is that you have a bunch of unrepresented litigants in the highest court in the land dealing with legal issues that are not only beyond their comprehension but also in a language that they may not understand. That is one issue.[116]

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112 *Submission 21*, p. 6.

113 *Committee Hansard*, 13 April 2005, p. 9.

114 *Committee Hansard*, 13 April 2005, p. 12.

115 *Committee Hansard*, 13 April 2005, pp 12 and 13.

116 *Committee Hansard*, 13 April 2005, p. 5.

3.104 Further, Mr Lenehan emphasised that the sound approach to addressing the problems in relation to judicial review of migration matters, 'particularly when you are dealing with fundamental rights, [is] not to rush in a solution which does not first look to what are the real problems here and what are their causes.'[117]

3.105 Professor George Williams and Dr Ben Saul submitted that other alternatives should be pursued:

> …the need for the legislation would be substantially reduced if other alternatives were first pursued: improving primary decision-making; enhancing the RRT's independence; increasing legal aid funding to improve the quality of migration advice about judicial review; removing restrictive interpretations of the refugee definition, and establishing complementary protection as a new migration status; and abolishing mandatory detention.[118]

3.106 At the hearing, a representative from DIMIA, in response to questioning about the Bill's misguided focus, described some of the other measures employed by that department:

> The department—and it is probably fair to say that the committee or various parliamentary committees—have looked at various aspects of immigration decision making. We certainly do have extensive examination of the quality of our primary decision making. We take seriously the outcomes of the merits review tribunals, look at ways of improving and watch very closely the decisions that are made by the Federal Court. We factor that into our training and have quite a comprehensive, good decision-making training process that takes account of all those aspects.[119]

The committee's view

3.107 The committee acknowledges concerns in relation to the Bill's perceived failure to adequately address structural and policy problems associated with judicial review of migration matters. The committee agrees that addressing some of these problems in the ways suggested by submissions and witnesses may have considerable merit. In particular, the committee recognises that it may be more effective to address the causes of 'unmeritorious' litigation as opposed to concentrating solely on its effect.

3.108 However, the committee considers that the Bill represents one of the strategies that may be helpful in streamlining judicial review of migration litigation, forming part of a broader strategy aimed at addressing some of the problematic issues at the heart of migration law in Australia. Therefore, subject to its earlier recommendations, the committee considers that the Bill should be passed by the Senate.

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117 *Committee Hansard*, 13 April 2005, p. 5.

118 *Submission 14*, p. 3.

119 *Committee Hansard*, 13 April 2005, p. 48.

Recommendation 3

3.3 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne
Chair